PROTECTING THE RECORD TO AVOID REVERSAL ON APPEAL

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I. WHAT IS "THE RECORD" AND WHY DOES IT MATTER?

After the trial is over and a case is on appeal, what is and isn't in the appellate record becomes crucial. Why? Because "[a]n appellate court will not speculate about the contents of anything not in the appellate record." *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990). In other words, if it isn't in the record—as far as the appellate court is concerned—it doesn't exist and it didn't happen. By the time the notice of appeal is filed, whether the conviction you worked hard to obtain stands or is remanded for a new trial may hinge on what did—or didn't—make it into the record.

While litigation requires keeping track of many things at once, it is key to also keep an eye toward the future appeal, whether the defendant's or the State's. With that in mind, one of your goals should be to ensure that the record accurately reflects what actually occurred during the trial to prevent a defendant from taking advantage of gaps in the record to succeed on appeal.

A. *What documents make up the record?*

1. "The record" is important, but exactly what is it? The record on appeal to the appellate court consists of:

- A certified transcript
- All documents, papers, books and photographs introduced into evidence
- All pleadings and documents in the file (in other words, anything filed with the clerk of court, other than subpoenas and *praecipes* not specifically designated)
- And, if authorized by the appellate court, an electronic recording of the proceeding.

Ariz. R. Crim. P. 31.8(a)(1).

With some limits, the parties may add to and delete from (mostly delete from) this list depending on the issues to be appealed. But first, a note on the parties. . . .

2. Parties. Usually in criminal cases, the defendant is the "appellant" because he seeks to appeal his conviction, sentence, or revocation of probation. A defendant who wishes to appeal must file a notice of appeal within 20 days of the imposition of sentence and entry of judgment of conviction. Ariz. R. Crim. P. 31.3. The State also has the right to appeal certain limited issues. *See* A.R.S. § 13–4032 (listing issues the State may appeal). To preserve its right to cross-appeal when the defendant appeals, the State must file a notice of cross-appeal within 20 days after service of the notice of appeal. Ariz. R. Crim. P. 31.3. However, when the State is the party that appeals, for example, challenging the suppression of evidence or dismissal of the indictment which results in the case being dismissed, then the State is the "appellant."

3. Additions and Deletions. The parties have a small window to add to or delete from the appellate record under Arizona Rule of Criminal Procedure 31.8(a)(2):

- The appellant has 5 days after the notice of appeal to add any "subpoenas and praecipes" deemed necessary and delete any "documents, papers, books, and photographs" deemed unnecessary.
- The appellee has 12 days after the notice of appeal to include any "subpoenas and praecipes" deemed necessary and to include anything deleted by the appellant.
- An order from the appellate court is necessary to add any exhibit not automatically included as part of the record. There is no time limit to obtain such an order.

4. What transcripts are included? Under Arizona Rule of Criminal Procedure 31.8(b)(2), transcripts from these proceedings are automatically included as part of the appellate record:

- Any voluntariness hearing or hearing on a motion to suppress;
- The trial, except for voir dire and opening and closing arguments, unless specifically designated by a party;
- Entry of judgment and sentence;
- A probation violation proceeding;
- An aggravation-mitigation hearing.

In capital cases, the transcripts of all proceedings, including the grand jury, are always included in the record.

Additions and deletions by the parties:

- The appellant has 5 days from the notice of appeal to add any transcripts not automatically included or to delete any that are not necessary.
- The appellee has 12 days from the notice of appeal to add transcript not automatically included or that was deleted by the appellant.

Ariz. R. Crim. P. 31.8(b)(4).

5. Sending the record to the appellate court. After the parties have had their opportunity to make their additions and deletions, the superior court clerk sends to the appellate court:

- The pleadings,
- documents,
- and minutes entries,
- and the original paper and photographic exhibits of a manageable size filed with the clerk of the superior court.

Ariz. R. Crim. P. 31.9(a). The authorized transcribers (court reporters) submit the transcripts. Ariz. R. Crim. P. 31.9(b).

Additional exhibits. The parties (at any time apparently; there is no time limit in the rule) may file a motion with the appellate court to add any exhibits that are not automatically party of the record under Rule 31.9(a). Ariz. R. Crim. P. 31.9(d).

6. What does the Attorney General's Office receive?

The appellate record that the Attorney General's Office has when an Assistant Attorney General is assigned to respond to a defendant's opening brief usually contains:

- The pleadings filed with the superior court clerk by the parties, which usually includes the charging documents release orders, disclosure notices, motions, proposed *voir dire* questions, written requests for jury instructions, sentencing memoranda, witness subpoenas, and any other items that the parties filed with the superior court clerk.

- The presentence report, the court's judgment, and the defendant's notice of appeal.
- The transcripts that appellant and appellee have requested be prepared and included on appeal—usually significant pretrial conferences, suppression hearings, *voir dire* and jury selection, trial testimony, and the sentencing hearing. (All transcripts in a capital case.)
- All trial and hearing exhibits—usually, but not always, video or audio recordings, documents, photographs, and digital media—that the parties ***did not request*** the clerk to release to them following the verdict(s).

7. <u>What is NOT part of the record on appeal?</u> Well, anything not in the record. But this could include more than you might think, such as:

- Any hearing or trial exhibits that were admitted into evidence but released to the parties.
- Exhibits that are marked and offered but *not* admitted into evidence.
- Any pleadings, motions, requested jury instructions, email or written correspondence with the court or defense counsel, etc. that the parties *did not file* with the superior court clerk. Note that hand-delivered documents to the judge and email correspondence with defense counsel and the judge do <u>not</u> constitute part of the record, <u>*unless*</u> the judge or the party also files the document with the superior court clerk, the document is read aloud in the court reporter's presence, or the court issues a minute entry reflecting its contents.
- Unrecorded conferences with the judge in chambers or at the bench.
- Any pretrial proceeding or part of the trial that the parties did not ask the court reporter to transcribe. Sometimes, appellant's request for trial transcripts will not include jury selection, opening statements, jury instructions, or closing arguments.
- Documents or other items that were shown to a witness or otherwise referenced, but never moved into evidence.

- Anything else that is not reflected in the court's minute entries, the superior court clerk's file, or a transcript by a court reporter.

B. ***How does what is and isn't in the record affect your case's appeal?***

1. <u>Omissions in the record generally benefit the Appellee—usually, but not always, the State.</u> In general, Rule 31 places the burden on the Appellant (usually the defendant) to decide what materials are, and are not, part of the appellate record. Occasionally, a defendant will fail to ensure that the record contains all materials relevant to the issues raised in the opening brief, such as the transcript of a hearing at which the trial court took testimony on or adjudicated an issue raised in the appeal. Or, the defendant may have failed to request the inclusion of a relevant exhibit that was released to defense counsel after the verdict. Generally, when this happens, the defendant will lose on that issue because "[w]here matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court." *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982).

2. <u>Here are some examples of a defendant's failure to include something in the record on appeal:</u>

- *State v. Dann*, 220 Ariz. 351, 370, ¶ 104, 207 P.3d 604, 623 (2009) ("A defendant who does not object to proceeding without a reporter, however, waives his right to complain that the proceedings were not recorded.").
- *State v. Lavers*, 168 Ariz. 376, 399, 814 P.2d 333, 356 (1991) ("When the record is not complete, we must assume that any evidence not available on appeal supports the trial court's actions. *State v. Crum*, 150 Ariz. 244, 247, 722 P.2d 971, 974 (App.1986) (court rejected argument that affidavit providing basis for search warrant was defective because the affidavit was never admitted into evidence); *State v. Kerr*, 142 Ariz. 426, 430, 690 P.2d 145, 149 (App.1984) (court rejected argument that motion to suppress should have been granted because counsel for the defense never introduced the warrant and attached list into evidence); *see State v. Zuck*, 134 Ariz. 509, 512–13, 658 P.2d 162, 165–66 (1982). Thus, by failing to ensure that the record on appeal is sufficient to support his argument, defendant has waived review of the restitution issue.").

- *State v. Ikirt*, 160 Ariz. 113, 117, 770 P.2d 1159, 1163 (1987) ("[T]he record on appeal must contain the material to which objection is made.").

- *State v. Jessen*, 130 Ariz. 1, 8, 633 P.2d 410, 417 (1981) ("The refused instruction No. 12 does not appear in the record on appeal. It was the responsibility of appellant's counsel to ensure that any document necessary to his client's argument was in the record on appeal. *See State v. Miller*, 120 Ariz. 224, 585 P.2d 244 (1978). . . . We will not speculate on the contents of the proffered instruction. We find no error.").

- *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995) ("It is the defendant's duty, as the party seeking relief, to prepare the record in such a manner as to allow the appellate court to pass upon the questions raised on appeal. *State v. Printz,* 125 Ariz. 300, 304, 609 P.2d 570, 574 (1980). When matters are not included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court. *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982). As a consequence, when a non-indigent criminal appellant fails to arrange and pay for transcripts, or other portions of the record, the excluded material cannot be subject to fundamental-error review.").

- *State v. Williams*, 168 Ariz. 367, 370, 813 P.2d 1376, 1379 (App. 1991) ("Appellant bears the burden of assuring that the record on appeal is sufficient to enable us to review the ruling he challenges." Defendant lost double jeopardy claim because the record was devoid of any evidence that he had another conviction arising from the same incident.).

- *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990) ("A hearing was held on appellant's motion to dismiss the indictment. The trial court heard sworn testimony before denying the motion. The transcript of that hearing is not part of the record on appeal. It is within the defendant's control as to what the record on appeal will contain, and it is the defendant's duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to be raised in the appeal.").

- *State v. Kerr*, 142 Ariz. 426, 430, 690 P.2d 145, 149 (App. 1984) ("Our problem here is that neither the search warrants, affidavits nor the attached list became part of the record on appeal. While the record on appeal is composed of all documents, papers, pleadings and other items introduced into evidence, counsel for the defendant never formally moved for their introduction into evidence, particularly the original warrant with the attached list.").

3. <u>Why is this important?</u> Although omissions in the record more often than not work against the defendant, that is only because the defendant is usually the appellant. But the same rules apply when the State is the appealing party pursuant to A.R.S. § 13–4032, or when the omitted materials are relevant to an issue the State has cross-appealed. *See, e.g.*, *State v. Nuckols*, 229 Ariz. 266, 274 P.3d 536 (App. 2012) (noting that state failed to provide a transcript of a hearing where the court made a relevant ruling).

4. <u>Making sure *Zuck* doesn't apply to your issue.</u> Here are some tips to ensure that if you initiate an appeal from an unfavorable ruling or a cross-appeal when the defendant appeals, you don't lose on appeal simply because the appellate record is missing something essential to your claim:

- Make sure to file with the superior court a list designating the transcripts, exhibits, and other materials you want to have included in the appellate record. *See* Arizona Rule of Criminal Procedure 31.8(a)(2)(ii).
- Any hearing or trial exhibits relevant to your claim should not be released to you, but should instead remain in the custody of the clerk for transmission to the appellate court.
- Order the transcripts for any proceeding at which the appealed issue was discussed or litigated. If you learn that the court reporter did not record a critical discussion, ask the judge to revisit the issue and state what happened on the record.
- Whenever there is a discussion of substantive matters, demand the attendance of a court reporter. If the judge refuses, or if the court reporter in attendance did not record the discussion, make a record of what happened at the earliest opportunity by revisiting the issue when the court reporter is present and taking notes. State on the record your recollection of what transpired, and give the judge and defense counsel an opportunity to address the issue before their memories fade. You might even file a pleading describing the unrecorded events. Also, ask the judge to have the day's minute entry reflect the discussion of the legal question at issue, what the respective parties' positions were, and the court's ruling, if any.

- Some courtrooms have their proceedings video-recorded. If the court reporter was not present, consider requesting that the video footage be made part of the record.

5. <u>Reconstruction of the record.</u> This procedure is sometimes available if, after the filing of the opening brief, the Assistant Attorney General thinks it is necessary to move the court of appeals to remand to the trial court for a reconstruction of the record. See Ariz. R. Crim. P. 31.8(h). Usually, it involves the trial lawyers and the trial judge discussing their recollections of what occurred and creating a record based on what they remember. This is only available for recreate events that actually happened in the trial court, not a chance to cure errors by supplying new evidence or argument that was not presented in the trial court.

II. REDUCING THE CHANCES OF REVERSAL ON APPEAL.

Now that we've covered what the record is and why it matters, this section addresses ways in which you can build a stronger record and better insulate your convictions against reversal on appeal.

A. *General tips for building a strong record.*

1. File preemptive motions in limine.

- This practice increases the likelihood that the trial court will conduct a required analysis, for example, that evidence is admissible under Rules 404(b) and 404(c), a hearsay exception, or the Confrontation Clause.
- In the 404(b) context, it also helps establish that the evidence was admitted for a proper, non-propensity purpose.
- Particularly important if you plan to mention the evidence in opening statement.
- May force the defense to make a responsive offer of proof; if the defense fails to do so, it decreases the likelihood of a successful defense appeal.
- Related point – make sure the court gives 404(b) or 404(c) limiting instructions when necessary.

2. Make sure to get a ruling.

- Make sure that the record reflects the reasons for the court's rulings and that the rulings were made.
- Especially important when the court defers ruling on an objection or motion in limine until later; sometimes they forget.

3. Make offers of proof when appropriate.

- If the defense moves to preclude your evidence, make an offer of proof.
- An offer of proof is essential if you intend to appeal the ruling precluding the evidence. *See State v. Hernandez*, 232 Ariz. 313, 321, ¶ 37, 305 P.3d 378, 386 (2013) ("Although Hernandez argues that he should have been allowed to impeach Maria's testimony with her prior inconsistent statements, the trial court did not err in precluding the questions absent an offer of proof of the prior statements. The lack of an offer of proof forecloses Hernandez's argument on appeal.").
- Even if the State does not appeal the ruling, the offer of proof still may be helpful to rebut an ineffective assistance of counsel claim in future proceedings.
- Example: the defense moves to preclude rebuttal evidence, arguing that the defense did not open the door. An offer of proof demonstrating what the rebuttal evidence would have been makes it harder for the defendant to prevail on a claim that defense counsel was ineffective for failing to introduce evidence or take some action that would have opened the door to the rebuttal evidence. *See Strickland v. Washington*, 466 U.S. 668, 699 (1984) (counsel made reasonable tactical choice not to present mitigating evidence of character or mental state during penalty phase of capita trial because it would have been of little help and would have opened the door to damaging rebuttal concerning the defendant's criminal history).

4. Make sure the record reflects what happens in the courtroom.

- Be sure important answers by witnesses are captured by the court reporter; especially important where more than one person is talking at once.
- Describe what is happening in the courtroom: when having witnesses review exhibits, refer to the exhibit by number; don't say "the exhibit" or "this exhibit."

- Make sure witnesses answer verbally. Also, "huh-uh" and "uh-huh" can be mistakenly transcribed by court reporters and misinterpreted by the appellate court.
- Ask witnesses to describe physical gestures and note for the record any significant non-verbal aspects of witness testimony. For example, ask the court to let the record reflect the witness's gestures and then describe them, OR, ask the witness to describe their gesture in words: For example: "Tell us what you mean in words when you say 'he pointed that way.'"

5. Suggest admonitions or curative jury instructions when appropriate.

- For example, if the defense asserts jury or prosecutorial misconduct, suggest that the court admonish or instruct the jury; if the defense rejects it, their burden on appeal is higher.

6. Witness preparation.

- Make sure witnesses are aware of any potential testimony the court has ruled inadmissible or improper.

7. Correct misstatements of the court or opposing counsel.

- Don't hesitate to offer a correction when a misstatement occurs. A simple mistake while speaking can result in a record that reflects the opposite of what actually occurred.

8. Summarize for the record any off-the-record decisions.

- Often the judge will do this, but if the judge does not, summarize the discussion or decision of the court on the record.

B. Specific areas where a better record is crucial.

1. Jury instructions.

The Rules of Criminal Procedure require the parties to submit to the court and the opposing party written requests for instructions and forms of verdict. Ariz. R. Crim. P. 21.2. However, the record on appeal often lacks any written requests for jury instructions or objections to the court's or opposing party's proposed instructions, perhaps because the parties did not file their requests with the clerk or submitted their requests informally. Sometimes these discussions take place during a conference at which the court and the parties settle the jury instructions. Often, these discussions take place outside the presence of a court reporter and the parties forget to revisit the discussion to note any objections or requests in the court reporter's presence. When this happens, there is no record establishing which instructions were requested, opposed, and refused by the parties.

The lack of a record on jury instructions can have severe consequences on appeal. Here are some specific areas where a weak record on jury instructions runs the risk of reversal:

a. Lesser-included offenses.

Example: the defense refuses a lesser-included offense instruction. In some cases the defense chooses to forego a lesser-included offense instruction, hoping to obtain an all-out acquittal rather than a conviction on a lesser charge. If the record does not reflect defense counsel's refutation of the lesser-included instruction, the defendant's appellate lawyer may argue that the trial court's failure to give the instruction was error. *See State v. Nordstrom*, 200 Ariz. 229, 253, ¶ 81, 25 P.3d 717, 741 (2001) ("Failure to instruct on all lesser-included offenses supported by the evidence constitutes fundamental error and requires reversal.").

How to address this problem. If the settling of jury instructions took place in chambers or without the court reporter, make sure to revisit the issue on the record before the jury receives the instructions and before closing argument. Ask the court to allow the minute entry to reflect that defense counsel refused a lesser-included offense instruction. Alternatively, if these approaches fail, file a pleading noting defense counsel's refusal of the instruction and attach any emails or documents in which defense counsel requested or objected to jury instructions.

b. Instructions requested by the defense.

Just as with any instructions that the defense refuses, also make sure that the record reflects any jury instructions that the defense requested. This prevents

appellate counsel from arguing that the instruction misstated the law or should not have been given and will allow the State to argue that any error was "invited." Because the invited error doctrine has a relatively high bar for its application, it is important that the record reflect any jury instructions that were affirmatively requested by the defense. *See State v. Lucero*, 223 Ariz. 129, 138, ¶ 31, 220 P.3d 249, 258 (App. 2009) (invited error doctrine applies only if the party complaining on appeal "affirmatively and independently initiated the error"; mere acquiescence is not enough).

c. Curative or limiting instructions.

Example: the defense refuses a limiting instruction on 404(b) evidence or refuses the judge's offer to instruct the jury to ignore evidence that was the subject of a mistrial motion. In the event that the defense refuses this type of instruction in chambers or an unrecorded bench conference, make sure to take the steps previously discussed to ensure that it is indicated in the record that the instruction was offered and that defense counsel refused. This will prevent an appellate argument that the court erred by failing to give the instruction.

d. Lesser-related offenses.

Occasionally, a defendant may request that the jury be instructed on a lesser-related offense that is not a lesser-included offense (e.g., criminal trespass in a burglary case). This constitutes an amendment to the indictment, which requires the defendant's consent under Rule 13.5(b). Therefore, the record must clearly show that the defendant either affirmatively requested (thus making any error invited) or at the least affirmatively consented to (thus satisfying Rule 13.5(b)) the instruction.

e. The State's position on instructions.

The record should also contain the State's position on jury instructions, especially the State's objection to any instruction proposed by the defense or the court. Doing so will preserve the State's right to cross-appeal when we have a claim that the trial court gave an instruction that was unwarranted or incorrect. *See* A.R.S. § 13–4032(3) (permitting State to appeal a "ruling on a question of law

adverse to the state when the defendant was convicted and appeals from the judgment").

2. Defense concessions. If the record does not reflect defense concessions, such as those regarding admissibility of prosecution evidence, correctness of jury instructions, or some action proposed by the trial judge, the defendant's appellate lawyer may argue that something defense counsel conceded to at trial was error.

Example: the defense concedes the admissibility of proposed prosecution evidence, such as evidence offered under Rule 404(b) or 404(c), but does so in chambers, during an unrecorded bench conference, or in an informal discussion with the prosecutor. Make sure that the concession makes it into the record, either by stating it on the record when the court reporter is transcribing and/or by asking the court to have the day's minute entry reflect the concession. Putting these concessions on the record may also give defense counsel the opportunity to state the reason for the concession which will help defend against future ineffective assistance of counsel claims.

* Note: Always be sure to determine whether bench conferences are being recorded by the court reporter or not. If they are not, make sure to bring up any important discussions again on the record when the court reporter is transcribing, such as at the next break when the jury is excused from the courtroom.

3. Admission or stipulation of prior convictions. Rule 17.6 requires the court to conduct a colloquy before accepting a defendant's admission of prior convictions for sentencing purposes. The absence of a colloquy may constitute fundamental error requiring resentencing. *See State v. Morales*, 215 Ariz. 59, 61, ¶ 9, 157 P.3d 479, 481 (2007). You can protect against prejudice from an inadequate colloquy, or the trial court's failure to give one at all, by including documents evidencing the priors in a written pleading or making an offer of proof regarding the evidence that would prove the priors. *See Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482 (no need to remand for resentencing based on lack of colloquy where copies of prior convictions were admitted into the record at a pretrial hearing).

4. Required findings. If the law requires the judge to make findings before admitting certain evidence, make sure that the judge makes the findings and that the record reflects the findings. If the court's findings are inadequate, move for clarification specifying which findings need additional development. Filing

preemptive motions in limine will also help ensure that the trial judge addresses and makes any required findings.

Example: Before admitting Rule 404(c) aberrant sexual propensity evidence, Rule 404(c)(1)(D) requires the court to make several specific findings. The judge's failure to do so can result in reversal on appeal. *See State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865 (2004) (reversal where findings were deficient).

* Note: Make sure to have marked as a hearing exhibit and included in the appellate record any evidence, such as police reports, photographs, or documents the court considered in making a determination on the admissibility of evidence. Additionally, if you submit video or audio recordings or transcripts of victims' statements to support the admissibility of other-act evidence, make sure that these exhibits, too, are admitted into evidence and remain part of the record transmitted to the appellate court.

5. Argue all applicable theories supporting your position. Generally, the State can successfully defend against an appeal even on a legal theory that was not presented by the prosecution at trial. *See State v. Canez*, 202 Ariz. 133, 151, ¶ 51, 42 P.3d 564, 582 (2002) (appellate court "obliged to uphold the trial court's ruling if legally correct for any reason").

However, there are a few areas where this principle may not apply, or where failing to argue all applicable theories at trial could hinder the State on appeal. Most likely, this situation can arise where an issue requires factual development, such as an exception to the warrant requirement. *See State v. Brita*, 158 Ariz. 121, 125, 761 P.2d 1025, 1029 (1988) (declining to consider State's argument that good faith exception applied, where it was not raised in the trial court, because it "depends upon the resolution of questions which are particularly factual in nature"). Here are some specific areas where failure to make an argument in the trial court may result in waiver of that argument on appeal:

Standing. When a defendant raises a constitutional challenge to a search or statute, the State may waive the ability to argue on appeal that a defendant lacked standing to challenge the constitutionality of a statute or search if the argument was not made in the trial court. *See State v. Hazlett*, 205 Ariz. 523, 525–26, ¶ 5, 73 P.3d 1258, 1260–61 (App. 2003).

Other act evidence. When admitting evidence under Rule 404(b), argue every applicable non-propensity purpose for which the evidence is relevant, including both those listed in the rule and any others that apply.

Fourth Amendment issues. Argue any applicable alternative theories when a defendant challenges a search or seizure under the Fourth Amendment, such as: lack of a search or seizure, no standing, validity of the warrant, any applicable exceptions to the warrant requirement, inevitable discovery, independent source, good-faith, etc.

***Miranda* issues**. Similarly, when the defendant raises a *Miranda* issue, make sure to argue any applicable theories, such as lack of custody, lack of interrogation, *Miranda* warning and waiver, re-initiation after invocation, etc.

State appeals. Arguing all applicable alternative theories is even more important in the event that the State seeks to appeal, especially the preclusion or suppression of prosecution evidence or the admission of defense evidence. See, e.g., *State v. Carlson*, 228 Ariz. 343, 349, ¶ 343, 266 P.3d 369, 375 (App. 2011) ("[W]e will not disturb a trial court's suppression order based on a ground or theory not asserted below by the state.").

CONCLUSION

Remember what *is* in the record:

- anything filed with the superior court clerk;
- exhibits entered into evidence; and
- anything noted by the court reporter…

…and what isn't:

- EVERYTHING else.

Remember, if it's not in the record, it didn't happen as far as the appellate court is concerned. Make sure that your record accurately depicts what happened at trial, and reduce the chances that a victory at trial becomes a re-do years down the line.